9-22-2009

Symposium Transcript: Make It Available at Your Own Risk: A Look into Copyright Infringement by Digital Distribution

Jay Dougherty
Loyola Law School Los Angeles

Russell Frackman
Mitchell Silberberg & Knupp LLP

Matthew Neco

MAKE IT AVAILABLE AT YOUR OWN RISK: A LOOK INTO COPYRIGHT INFRINGEMENT BY DIGITAL DISTRIBUTION

SATURDAY, APRIL 18, 2009

Jay Dougherty, Moderator[*]

Russell Frackman, Panelist[**]

Matthew Neco, Panelist[***]

Mark Robertson, Organizer[****]

Greg Strausberg, Organizer[*****]

MARK ROBERTSON: Good morning, everyone. Thank you for coming. We're glad to see you all here. My name is Mark Robertson. I'm the Editor-in-Chief of the *Entertainment Law Review* here. Before we get started, I just wanted to acknowledge a few people who helped organize this event and made it possible. David Jonelis from the Entertainment & Sports Law Society had a hand in helping us out with this. Patrick Alach, the Chief Articles Editor from *Entertainment Law Review* also helped out with the event. And you'll see in the packets that you picked up two briefs from *Elektra v. Barker*, and we want to acknowledge the attorneys that gave us the permission to distribute those today. Andrew Bridges from Winston & Strawn gave us permission to republish his brief, the Computer & Communications Industry brief. And Jonathan Zavin and Karen Thorland, both from Loeb & Loeb, and Eric Schwartz from Mitchell Silberberg & Knupp, all gave us permission to distribute the Motion Pictures Association of America brief in your materials. Additionally, we'd like to acknowledge Drew Wheeler, who helped us with the event,

---

[*]Professor of Law, Loyola Law School

[**]Attorney, Mitchell Silberberg & Knupp LLP

[***]Attorney, Former Vice President and General Counsel, Stirling Bridge, Inc.

[****]Editor in Chief, Loyola of Los Angeles Entertainment Law Review

[*****]President, Loyola of Los Angeles Entertainment and Sports Law Society

and David Helfant of the Law Offices of David Helfant. Additionally, AMEC gave us some promotional assistance with the event. And of course, none of this is possible without Loyola Law School and their support, in particular, Dean Ellen April and Dean David Leonard. So from there, we'd like to move on.

Greg Strausberg is the President of the Entertainment & Sports Law Society, and he will introduce our panelists today. Thank you again for coming.

[APPLAUSE]

GREG STRAUSBERG: Thank you, Mark, for your kind introduction. It's my pleasure to have everyone come out on a Saturday. We sincerely appreciate it.

I'd like to introduce our panel today, Making It Available at Your Own Risk, which some of you have been introduced to in your courses, some from online reading, and some from other sources. First, I'd like to introduce Russell Frackman from Mitchell Silberberg & Knupp. Russell Frackman is where the music industry chooses to go for a copyright lawsuit. Mr. Frackman was named one of the Los Angeles' top litigators by the *Los Angeles Business Journal* and named Entertainment Lawyer of the Year for 2001 by the Beverly Hills Bar Association. Mr. Frackman is one of the leading experts in copyright law. Thank you, Russell, for being here today.

RUSSELL FRACKMAN: You're welcome.

GREG STRAUSBERG: We sincerely appreciate it. Next, we have Matthew Neco, who has been extremely influential in the peer-to-peer music file sharing industry. Matthew Neco was most recently General Counsel to Los Angeles-based Stirling Bridge, Inc. and its subsidiaries, including StreamCast Network, who is the developer of Morpheus, the file sharing network that some of you might have been introduced to in your college years. He accompanied one of the seminal copyright versus technology cases in the *MGM v. Grokster* case, and he followed that all the way up to the United States Supreme Court and all the way back down to the District Court. So thank you, Matt. We appreciate you coming in here today.

MATTHEW NECO: My pleasure.

GREG STRAUSBERG: Next, as our moderator today, we have Professor F. Jay Dougherty, fresh off the heels of his Soft Money Symposium, which happened last night. So thank you, Professor Dougherty, for being here today. Just a little background on Professor Dougherty: His legal career began in the Entertainment Department of Paul, Weiss, Rifkind, Wharton & Garrison in New York where his work

included the representation of Broadway composers and authors. His interest in the motion picture area led to positions at the Motion Picture, Television, and Music Departments of Mitchell, Silberberg & Knupp, the Legal Departments at United Artists Pictures, Metro-Goldwyn-Mayer, to the Business Affairs Department at Morgan Creek Productions. He also served at Twentieth Century Fox, where he became Senior Vice-President of Production and Worldwide Acquisition Legal Affairs. Before joining the Loyola faculty, Professor Dougherty served as General Counsel for Turner Broadcasting System, responsible for Turner Pictures. Thank you, Professor, for being here today. And from here, I'm going to leave it to you to kick off. And everybody, thank you again for coming.

[APPLAUSE]

PROFESSOR DOUGHERTY: Thanks, Greg, it's a pleasure to be here. And thank you, all of you, for coming out to this event. It's always hard for me to live up to Greg's introductions, but I'll do my best. I'm going to give a little introductory talk about the issue that we're covering today and then turn it over to our guest speakers to get into a more detailed discussion of the arguments on this issue.

The issue we're talking about is the problem of what you might call digital public sharing of copyrighted materials. Usually at this point, it's music—although it's quickly becoming all sorts of other material. On one side of the issue you might find the RIAA. I'll talk in a moment about some statistics you could get from their website. And on the other side, you might find organizations like the Electronic Frontier Foundation, which has been involved in the defense of some of these cases. So let's talk a little bit about the problem. How many of you have never used a peer-to-peer file sharing system?

[Some hands rise.]

PROFESSOR DOUGHERTY: I'm happy to see Russ Frackman's son has raised his hand, very cautiously. But no one else raised their hand.

RUSSELL FRACKMAN: Don't put him under oath, Jay.

PROFESSOR DOUGHERTY: I won't. And I will confess to having used them. In the early days, I did have Morpheus and used it solely for teaching purposes.

Well, decentralized P2P, or peer-to-peer file sharing software, has arguably created a real problem for the record industry and potentially others as well. The technology permits individuals to connect with other individual users' computers—so peers connect with the peers—and to access the files within those computers, as opposed to going to central servers, which was the original architecture of a client-server software community. The RIAA statistics give you a little picture of the state of the

record business. It's quite interesting. And I'm not sure that it's all a result of digital file sharing. It may be other things.

There may be some years where it's the quality of the records that come out. But the figures are pretty bleak, frankly, for the industry. Most industries like to grow, and this decline in CD sales was going on before the general downturn in the economy. The change between 2007 and 2008 in terms of record sales include pretty broad numbers. They include things like music videos and so on. It's interesting that between those two years there's been very slight gain in terms of the number of units sold, a little bit over 4% between 2007 and 2008. But on the other hand, the total value of the units sold is about 18% lower in one year, and that's a trend that's been going on for years now.

And so the industry has really been slammed, and I think it's fair to say that a good portion of that is due to this widespread public sharing. I'm trying to use a neutral term sharing rather than piracy or stealing. I think there's another interesting trend—then I'll move off these statistics—which is the comparison of physical and digital sales.

If you look at the trend starting in 2005, physical sales were 91% of the total; digital was 9% of the total. The next year, sales were 84% physical, 16% digital. The next year, 2007, it was 77% physical, 23% digital. And in 2008, it was 68% physical, 32% digital. So clearly the record industry itself is moving towards the digital model for a great deal of record sales. That said, I will say that the big, big growth item between 2007 and 2008 was vinyl. Vinyl sales have increased over 100%. They more than doubled in that one year. As a dinosaur record collector, I'm happy that people still buy vinyl. And I watch Leno and Letterman and I see them often waving around a vinyl copy of a new album by an artist.

So record sales generally, though, are down and the industry hasn't yet fully succeeded in managing the legitimate digital distribution of recordings. And at the same time, if you look at the figures regarding peer-to-peer file sharing software, now, they've become a little less striking than they were in past years.

I pulled these off CNET. Here are figures for some of the most popular digital file sharers. And if you're downloading from CNET—which is only one site, by the way, for downloading these things— let me tell you what they say. MP3 Rocket 5.2 seems to be one of the least popular at the moment. Almost 4 million downloads; and in fact, in the last week, there were over 40,000 downloads of that software. LimeWire 5.1.2 has almost 200 million downloads—177 million download, actually—and 420,000 just last week. CrossWire, almost 20 million downloads, with 260,000 last week. BitComet over 70 million downloads with 123,000 last

week. And uTorrent, almost 5 million downloads with over 50,000 last week. So my point is that there are hundreds of millions of copies of these peer-to-peer software systems out there that people download into their computers, which makes it not surprising that no one raised their hand other than my friend over there.

And there are legitimate uses for that software, but I think that you probably know that they are often used for the purposes of downloading copyrighted material without having express permission from the copyright owner. So that's the problem. The record companies have a multi-prong strategy—Russ might speak a little more about this—but part of that strategy involved going after the middleman. So initially they went after some of these peer-to-peer file sharing systems. And of course we've heard of these. There were very widely publicized cases against Napster, Grokster, Aimster, etc. Mr. Frackman was involved in a number of those lawsuits so we may hear some more about those. And you may know that they were, I would say, reasonably successful in persuading courts to find that those companies have liability. On slightly different theories between Napster and Grokster, they still, at the end of the day, were found to be contributory infringers of copyright. But that didn't stop the problem.

So the record companies did something that companies don't like to do, I think it's fair to say, which is to sue their customers. They initiated a lot of lawsuits against individuals. Russ will know this better than I, but I think it was largely against individuals who were making available large numbers of sound recording files in their shared folders on their computers and who also had peer-to-peer file sharing software. There are a whole slew of difficult issues arising out of those suits; for example, identifying the user. The Internet has a culture of anonymity. So they brought these lawsuits against a large number of individuals, and there've been a few that have caused really bad publicity for the record industry: the occasional grandma who probably doesn't listen to Metallica, young kids, people who are deaf.

But there are issues in getting identities of people on the Internet and I think that, for the large part, those weren't the situations, and they probably did track down people who had music files in their folders on their computer along with their file sharing software. So the complaints that have been filed—and there have been many thousands—often include the claim that I have up here on the board. "Plaintiffs are informed and believe that each defendant without the permission of plaintiffs has used and continues to use an online media distribution system to download, distribute to the public and/or make available for distribution to others certain copyrighted recordings."

So this has brought to court the question of whether or not making available a file is itself an infringement of the copyright without other actions. And that's really our core discussion today. I'm going to try to give a little more introduction and background and then we'll get into the arguments.

There are many unsettled questions in connection with these claims. But the overarching question is should this be a violation of copyright? Does the law currently provide an exclusive right to make works available to the public? Should it provide it? If it doesn't, should Congress expressly provide a making-available right, and I hope that our speakers will be speaking a little bit about that policy question, about really should this be and why or why not?

The earlier cases reached mixed results. There were a few that concluded that making-available does constitute distribution. Making-available could be viewed as an alternative way of saying that they might be offering something for distribution, but making-available is a little more of a passive action. Some cases did find making-available to be a distribution and a violation of the exclusive distribution right. Others didn't.

So there have been mixed precedents regarding this issue.

In the last year, there were some rather high-profile cases. They're all at the District Court level. The *Barker*[1] case, the *London-Sire*[2] case, the *Howell*[3] case, and the *Thomas*[4] case, all dealt with this issue, but not in a particularly consistent way. I think that the major issues that we're going to be focusing on here—and the courts focus on here—are the following.

In addition to the overarching policy question about what should the law be on this subject, first there's an underlying question: is the digital transfer of the file a distribution at all? Even if you have evidence that someone downloads a file, is that a distribution by the uploader? Secondly, in many cases, the record companies have had to try to identify people that are making these files available by using a company or peer-to-peer sharing software that goes and looks to see what's in people's share folders and then snaps a photo of it. MediaSentry is one of those. There is a question about whether or not if there's proof that that agent has downloaded, is that an infringing download or not? You can't infringe your own copyright is one argument, and there are other arguments with regard to whether those

1. *Elektra Entertainment Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008).
2. *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153 (D. Mass. 2008).
3. *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008).
4. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

MediaSentry or other similar programs, or when the record companies themselves downloaded files, whether that would be evidence of infringing distribution? Third, the core topic: is making available a copyrighted work a distribution to the public, even without evidence of further distribution, assuming that this electronic transfer is distribution? And the fourth question would be, is making-available an unlawful authorizing of a distribution? I'll give you a little more background on that in a moment. Last, if making-available is not itself a violation of the distribution right—is it circumstantial evidence that there has been and will be unauthorized distribution of files? So all of those are issues that I think our speakers will address.

I'm just going to give you a little bit more background. So here's the basic statutory provision that tells you what the rights are within copyright. And I think it's fair to say that the idea—at least with the *Sony*[5] Betamax decision at the Ninth Circuit level which viewed this and wasn't reversed at the Supreme Court level[6]—they said that these rights are specific but fairly broad and that the courts should not carve out limitations and exceptions. In the *Sony*[7] Betamax case, they were being asked to carve out an exception for personal home copying of television programming. And they said that that's not appropriate, that there are very specific limitations in the statute, but that other than that, these rights should be read fairly broadly, although they are specific.

So you have this bundle of rights, and I left one out—in fact, a kind of important one, the digital audio transmission right—but basically: the right to reproduce works and copies or phonorecords; the right to prepare derivative works based on that work, so adaptations; and the one that's our primary topic today, the right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease or lending. That statutory language will be the subject as a part of this argument today – to distribute copies or phonorecords to the public by sale or transfer of ownership, or by rental, lease or lending.

There is also a right to perform works publicly—playing songs over the radio, for example—and a right to display publicly certain types of works. But our core concern has to do with that distribution right. So I think it's fair to say that the commentators generally say that infringement of the distribution right requires actual dissemination of copies or phonorecords.

---

5. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981).

6. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

7. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Briefly speaking, these are some of the arguments on each side of the question of whether making-available is distribution. One of them has to do with the definition of "publication" in the statute—which I'll show you in a moment—and argues that the definition of publication encompasses making-available and distribution so that all publications are distributions. There are also some additional facts to support the claim that we have a making-available right. There's a letter from Marybeth Peters, the Register of Copyrights, to Congressman Howard Berman saying that the Copyright Office's understanding of the statute is that it includes a making-available right. And we are signatory to a number of treaties that require us to provide a making-available right. Signatories have to provide for a making-available right.

On the other side of the issue, it's argued that not all publications are distributions, that *Hotaling*[8] is a case with very little support for its conclusion. The Register lacks authority to interpret the copyright law, and WIPO treaties and other treaties aren't self-executing. So I think we'll hear more detail about those in a moment.

The *Hotaling* case—is it all right if I talk about the *Hotaling* case in specific? Either of you plan to do it?

RUSSELL FRACKMAN: Go right ahead. I like that case.

PROFESSOR DOUGHERTY: Yes. The *Hotaling* case, interestingly, does not involve the internet. A very low-tech case, it involved a copy of a document that was kept in a library at the Church of Jesus Christ of Latter Day Saints. And I think it was a genealogical work. The setting of the case is a bit complicated, but because of the statute of limitations, the case had focused on a very limited potential infringement of copyright. There was one unauthorized copy of this genealogical work in the library and there was no other evidence that anyone had actually checked it out or used it. It was in their catalog, available to be checked out, but no evidence that it had actually been checked out by anybody. And the owner of copyright in that genealogical work sued for copyright infringement and because the statute of limitations had run. There was really nothing else that could have been a violation, only that making-available of that one genealogical work in their collection. And the court found that that was a violation of the distribution right; that, basically, a library distributes a published work when it places an unauthorized copy of the work in its collections or includes the copy in a catalog or index system, [and it] makes the copy available to the public.

So this case, if it were persuasive, seems to be pretty analogous to the

8. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 188 F.3d 199 (4th Cir. 1997).

internet filing sharing file folder on your computer. It includes copying and the index [of the copy] so that people can get at it. It's available to the public. Under this case, that would be a distribution.

But their argument was mainly based on policy that to find otherwise would permit infringers to avoid liability by not keeping records of their distribution. And I'm imagining some of our guests may have views as to whether or not that actually is happening in peer-to-peer file sharing systems. Another argument is based on the WIPO Treaties, and I want to show you the language of the treaties.

One of them is the WIPO Copyright Treaty, which essentially led to the Digital Millennium Copyright Act. It deals with online matters and one provision of that says that "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making-available to the public of the original and copies of their works through sale or other transfer of ownership."[9] The WIPO Phonograms Treaty also has a couple of provisions that say roughly the same thing: "Both performers and producers of phonograms"—which is what sound recordings or records are referred to internationally—"shall enjoy the exclusive right of authorizing the making-available to the public of their performances by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them."[10]

So the treaty does seem to contemplate the very sort of thing that we are talking about here. And I want to skip to one more piece of sort of specific statutory language without getting into the argument. I mentioned that one of the arguments has to do with the definition of publication. The word "distribute" isn't defined in the copyright statute, although as you saw, there were some phrases in the statutory provision that provide for the right, that talked about certain types of activity: sale, transfer of ownership, et cetera. But publication is defined in the statute and here's the definition: "Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending."[11] Well, that sounds a lot like the language used in the statutory provision that provides the distribution rights, right? But there's a further sentence here that says that "the offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance or public display"[12] constitutes publication too. So

9. World Intellectual Property Organization Copyright Treaty art. 6, Dec. 20, 1996.

10. World Intellectual Property Organization Performances and Phonograms Treaty art. 10, 14, Dec. 20, 1996.

11. 17 U.S.C. § 101 (2007).

12. 17 U.S.C. § 101 (2007).

there's that second sentence. And one of the arguments that you'll hear about turns on whether or not that also applies to the distribution right. Did Congress intend by using the word "distribute" and making the right to distribute a right of copyright—did they intend to include offering to distribute pursuant to this language? So I hope that lays the groundwork for some of the arguments and I know Mr. Frackman will give you a little more specific arguments on these issues.

MATTHEW NECO: So I'm just going to start by illustrating how peer-to-peer file sharing networks, and the software applications that allow users to access those networks operate, and then Russ is going to talk a little bit. But I thought this would be important for you all to see this illustrated. [Matt begins to write and draw a schematic of sorts on the white board of what the Napster centralized indexing P2P looked like and how it operated, from a high level (non-technical) overview.]

So in P2P, originally under the Napster software, Napster basically allowed individual users of the Napster software application to share the files that they had in their Share folder. An end user would install the application on his or her computer and then, depending upon how that particular application worked, the application either would automatically create a "share folder" or would access another folder on your computer that was already existing, such as a My Music Folder or My Photos Folder or something like that. You have these users and they would all have part of their folders in here, and let's just say that—in the Napster's case, it was only music. It was very file-type specific. It was MP3 files.

What would happen is that a user would indicate to Napster what his or her MP3 files are. A user wouldn't actually transfer any of those files to Napster. Napster would simply create an index or directory . Napster would learn about all of these files—what user had what on his or her computer. So then, if you had a user who was searching—let's say that user had ten MP3 files on their computer, and I'm going to use Britney Spears as an example because, for some reason, Britney Spears seems to be the most often cited musical artist in the MP3 world that is alleged to have had her works infringed upon directly by downloaders.

So let's say you have a user here who has ten files and one of them is a Britney Spears file. So Napster knows that Britney Spears is on computer User Number 1 computer. This user over here, User Number 2, wants a Britney Spears song, so that user creates a query. That query goes to Napster, and Napster essentially says, "Oh, we know that User Number 1 has that particular file, so here's how you get it—we're going to send you instructions, User Number 2, on how to get that file. And you can get that file directly from User Number 1, but you've got this index here that has

directed you how to do that." So that's how Napster originally worked. There was a centralized P2P file sharing system. As more users utilized the program, Napster had to have more central servers in order to meet the demand. That was the original way that Napster worked, in essence. Regarding decentralized file sharing programs that came into existence after Napster, there's argument as to whether they came into existence because they wanted to conform with the law and avoid copyright infringement, whether they wanted to evade copyright infringement accusations by secondary copyright infringement, or whether this was just, technologically, a more functional and elegant solution to P2P file sharing.

What happens in that system is that, in essence, each user became somewhat of a node. So instead of there being that centralized server that was Napster, you had many of these other peers that basically became servers themselves. They would index, in essence, what other users had on their computers. So they became nodes without the use of a centralized computer system. Then what would happen is that, if you were a node—the user was a node—and someone was searching for a Britney Spears file, they would go to that node, learn where the file they're looking for may be, and then would connect to another peer, another user, without the need of any centralized server. So there's no longer an intermediary in existence there. There's no longer bandwidth issues that may be an issue. There are no longer server issues. What happens if the Napster server goes down? Well, then people can't find the files that they're looking for. That doesn't happen with decentralized P2P applications. You don't have central points of failure in decentralized peer-to-peer file sharing networks. So you can have, then, millions and millions and millions of nodes—or ultrapeers as they may be called, depending upon the particular software application that exists—and then millions and millions and millions more of users all interconnected in various ways. And so you can have, for example, ten million users that are on one particular peer-to-peer file sharing network.

For example, consider Gnutella, which is accessible by users of various software applications. You could use LimeWire to access the Gnutella network. You could use BearShare to access the Gnutella network and Morpheus as well; although Morpheus is no longer being distributed legitimately since it's in Chapter 7.

And, by the way, I want you all to know that I do not condone the use of any file sharing application for infringing purposes. There are good and legitimate purposes for P2P file sharing that the courts have recognized exist. It's unfortunate that many users of these P2P file sharing applications have misused these P2P applications for various reasons.

But in any event, you can have ten million users each with ten songs

in a share folder and let's say every one of those songs is the same. The odds of that happening are pretty slim, but when you look at it from a perspective of what do most P2P file sharing users have in their Share Folders, you'll find a great amount of commonality because a lot of people like to get the same kind of music or same kind of files. So then you have ten million and one. User Number Ten Million and One signs on, downloads a P2P file sharing application. This is the first time they've ever used this application, and they decide that they're going to search for a Britney Spears song. So they do their search for a Britney Spears song and where do they find it? Do they find it from this user, do they find it from this user, or that user, or that user? Hard to know where that particular song came from, and therefore, who has distributed that particular song to that particular user? That's just a little bit of a setup to show you a little bit about how the P2P architecture in a centralized and a decentralized methodology works.

RUSSELL FRACKMAN: First of all, let me thank you all for inviting me today. It's always a great pleasure to participate in any endeavor with Professor Dougherty and Matt. I have been on your side of the table on several different occasions. And I'm glad to see that we have one area of agreement, which is that the peer-to-peer services have been greatly misused in terms of copying and distributing copyrighted material. Ultimately, it seems to me, for policy and legal reasons, that's why there has to be a making-available right. I would disagree with only one thing, I think, that Professor Dougherty said, and that is that "sharing" is a neutral term. If you go back to the early days of the *Napster* litigation, there was actually a semantic battle between the parties with Napster's lawyers in briefs and argument referring over and over again to "sharing." And our side, if you will, the copyright proprietors, referring to "copying" and "distribution." We lost that battle, that semantic battle. I'm happy to say that it appears to be the only battle that we lost in the *Napster* case and some others. But it brings us to the nub of the issue now because, as Matt has alluded to, things have changed to a large degree.

The one thing that hasn't changed is that there are peer-to-peer services—and I think this probably has some applicability to what we say today—and the user-generated content sites that still permit and encourage, to some extent, the copying of copyrighted recordings and musical compositions.

Before I get any further, let me give you a disclaimer. As you know, I—and my law firm—have represented both the RIAA and record companies in several of these cases. In none of the making-available cases that we will specifically be discussing today, have I been involved—

although our law firm was involved initially when coordinating the user lawsuits throughout the country. As I say, I have not personally been involved in any of the making-available cases, but I obviously have a point of view. I should say it is my point of view and not necessarily the point of view of any of my clients.

So with that introduction, if you will, let me tell you what I'd like to talk about first. First as a prelude, there probably actually are—I think I just counted them and if I've counted correctly—ten cases in 2008[13] that deal in one way, shape or form with the making-available right, and several before them that deal pretty much all in the context of peer-to-peer services. As Professor Dougherty said, they come out in different ways, some for a making-available right, some against it. Some defer the issue, some duck the issue completely. They are all District Court opinions, the most famous one of which, of course, is the *Thomas*[14] case. I won't give you citations. I think some of them are in the booklet and the others are certainly readily available.

The one that, to some extent, spawned the interest in this area is the *Thomas*[15] case, which was the first of these user cases to go to trial and the jury awarded $222,000 to the plaintiff record companies and, ultimately, the judge granted a new trial based specifically on the making-available distribution right. That trial, by the way, I think is scheduled to commence in June. The record company plaintiffs asked the Court to certify the case so it could go up immediately for appeal. The District Judge, for whatever reason—and I don't know the reasons—refused to do so. So we're still waiting for one of these to wend their way up to the Court of Appeals. The legal issues, and Professor Dougherty gave you a preview of them, are very dense. I find them very dense and very complicated, and I'm not sure that I can do justice to them in this format or at all.

But what I want to do before we get there, and I'm sure we will discuss ultimately some of these, I want to put all of this in context for you because I think one of the questions that is appropriately asked is, why

13. *See, e.g. Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008); *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008); *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008); *Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. 2006); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006); *Elektra Entm't Group, Inc. v. Brimley*, 2006 WL 2367135 (S.D. Ga. 2006); *Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415 (W.D. Tex. 2006); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006).

14. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

15. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

now? Why is a making-available right becoming a heavily-litigated and important, apparently, legal issue at this time. And why, mostly, if not exclusively, in many record company/user cases? And let me tell you what I think the reasons are. First, there is no absolute definition of making-available—as Professor Dougherty said, there is no definition of distribution in the Copyright Act. But there are a couple of working definitions I think that we can use.

The first one is the actual jury instruction that the Court gave in *Thomas* that led to the jury verdict, which the Court ultimately said was an improper jury instruction. Making-available was defined as follows: "The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network without license from the copyright owners violates the copyright owner's exclusive right of distribution, regardless of whether actual distribution has been shown."[16] Another definition of making-available that I've read is as follows: "A making-available right means an exclusive right to make a work available, i.e., to offer copies of it over the Internet or a similar network to members of the public who can decide whether to access or copy it." So we've got similar, and I think pretty clear, definitions of what making-available is.

Now, why has this become an important issue in these cases—why after 30 years? The distribution right, as it's now codified, came into the Copyright Act in what those of us who have been around that long call the Old Act, the 1976 Act that became effective in 1978. And we'll get to what the prior Act said later, maybe when we discuss some of the legal issues. But why after 30 years has this become important?

I thought I'd illustrate it by some of my own background and I hope this does serve to illustrate. When I first started to practice in this area, the area of what we then called record and tape piracy, these are the kinds of things that we were going after: vinyl records and 8-track tapes [holds up physical examples so that the audience can see]. Both of these, by the way, are exhibits from actual cases that go back longer than I wish to remember.

PROFESSOR DOUGHERTY: *Teaser and the Firecat*?

RUSSELL FRACKMAN: *Teaser and the Firecat.* And this happens to be, I believe, a John Lennon vinyl record. Cat Stevens, I understand, is just about to release another album, so. . .

MATTHEW NECO: Under a new name.

Russell Frackman:

Yes. What's old becomes new. Now, let me talk about these two recordings that I think put in context what we're dealing with.

16. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

In order to become a record pirate in those days, you had to have a major capital contribution. You had to be able to press records, either yourself or to go through a record pressing plant and press them. And you also had to have a fairly sophisticated—or maybe unsophisticated—but you had to have some actual distribution mechanism: sell them in stores, sell them in swap meets, sell them out of the trunk of your car. And you needed to make multiple physical copies in order to sell.

Something else that went along with this was that each copy was degraded. You didn't have, as you have in the digital medium, exact copies, so there probably was a somewhat less incentive for some people to go out and buy these.

When you get to the 8-track era, and also the cassette era, you don't really need the capital contribution. People were making these things in their garages. But you also had the degraded analog copies. And more important, again, you needed to make multiple copies of these in order to distribute them and you needed a distribution mechanism.

You then got to what is really a historical anomaly here. Probably many of you, or all of you, have never seen something like this before [holds up another, smaller, item]. This is a DAT, a Digital Audio Tape, which scared the copyright proprietors because it was the first time that you could make exact copies. It was a digital medium—you can make exact copies easily without needing to press CDs. It became a historical anomaly because of the Audio Home Recording Act, which now itself is a historical anomaly, but that's a story for another time. And then you got to CDs. And again, you had the need for a large amount of capital to press these things, but now, once you did that, you had exact copies that you could sell. But once again, you needed a distribution mechanism and you needed multiple copies.

Then we get to the Internet and we get to the peer-to-peer systems. And you have what has been referred to as the perfect storm because you didn't need any capital, you made perfect copies, and more important for what we're talking about, you didn't need a distribution system—an actual distribution system—and you didn't need to make actual, traceable copies. And so where you were was copyright owners needed a mechanism to be able to apply copyright principles in a situation where there was no actual distribution and there were no multiple copies. One avenue, of course, is the Napster[17], Aimster[18], Grokster[19] avenue—litigating with the services

17. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

18. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

19. *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

that provided the infringing material. One problem there, of course, was you needed an underlying infringement in order to prove secondary liability. The second problem is a large number of the user cases that we've talked about started—at least those that the RIAA started – because of the Ninth Circuit *Grokster*[20] opinion and the District Court *Grokster*[21] opinion, which kind of knocked the hell out of the secondary liability argument on the decentralized systems that Matt outlined, and therefore, led the companies, the copyright owners, to go look for different ways to protect their works.

If you went to the users and you claimed a violation of the reproduction right, you ran into particular problems. Was it a fair use if somebody just ripped their own CD? That may or may not have been a fair use at the time. Was it a legitimate digital copy (such as a legitimate MP3) that they were "sharing?" There was no easy way to prove reproduction, which left you to the distribution right. At the same time, the individual user was not a business, like the people who sold the stuff. They didn't keep records. It was done anonymously. It was done privately. And probably equally important, if you waited until a single copy was "shared"—in other words, waited for actual distribution—as we all know, the horse was out of the barn. It couldn't be traced easily. It couldn't be recalled. And it was then virally distributed over the peer-to-peer systems. And so because there was no easy way to prove a violation of the reproduction right, and an actual distribution was difficult, if not impossible, to locate and it was too late by then, there had to be a making-available right. At the time that somebody put something up on their share folder, that user had completed every act that was necessary on his or her part to distribute the recording, the copyrighted material. And it seemed logical and it seemed to flow from—as Professor Dougherty mentioned—the right of publication. It seemed to flow from the right that was assumed a copyright owner had, which was to make available to the public the copyrighted work. If you couldn't stop the distribution over a peer-to-peer system, for example, until after it was distributed, then the copyright owner no longer had the exclusive right to make its work available because other people were making it available. The owner no longer had the exclusive right to distribute because the work had already been distributed. You could try to stop it afterward and you could try to get damages for it, but that exclusive distribution right in the context that we're talking about

20. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 419 F.3d 1005 (9th Cir. 2005).

21. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007).

disappeared. That's why before we get into it—and I'm going to stop here for the time being—I think you have to look at the overlay of these practical necessities in order to advance the broad directives of Congress in the Copyright Act to provide protection for copyright proprietors with respect to the specifically enumerated exclusive rights, one of which is the right of distribution.

MATTHEW NECO: So let me also impose a disclaimer that the viewpoints that I'm going to express today are not viewpoints of former, present or future clients, necessarily. Nor may they always be my own viewpoints. They may be imposed in order to stimulate some discussion and some thinking here. I also think that's important for people to realize that, notwithstanding the fact that I was General Counsel of a company that was involved in the *Grokster* case and distributed P2P file sharing software, my personal viewpoint is that copyright holders should indeed be compensated. I am not a copy-left person who believes in the abolition of copyright. It's a question, though, in today's changing technologies and economics, as to how copyright holders should be compensated and whether that means that they have sort of lost in today's day and age the rights to exclusively control distribution and windows and territories. There has to be a more realistic viewpoint by society and Congress that there should be other ways to compensate copyright holders. I think that those are all things that need to be examined in some greater detail.

And on that note, I think it's important to note that the current Copyright Act, which was, as Russ says, is the 1976 act and which was effectuated in 1978, has been amended about 50 times so far. The courts have been very consistent and clear in stating that copyright policy and legislation is something that is difficult, that the courts try to stay away from legislating from the bench in terms of copyright. They want the legislature to address these copyright issues—to have the stakeholders deal with it and not to have the courts deal with it. The reality, of course, is that in the past, to a large extent, Congress would basically say to the stakeholders, "Sit down at a table in a conference. Work this out. Let us know what you've come up with." Often times when that has occurred the stakeholders have been creators and publishers and not really the citizens. A lot of people like to refer to the citizens of this country as being consumers, but I think when it comes to a lot of the rights that we should have in terms of access to information, including certain forms of entertainment, that it really is we're the citizens. We're not consumers that the entertainment and content industries should just view as their consumers or Congress should just view as its consumers. That we have certain interests here, and that's in the Constitution in that there's a balance

between incentivizing creators to create and doing so for the greater good of society.

And I think that what needs to happen is that the stakeholders need to get involved to a greater extent than they have more recently. For example, the Electronic Frontier Foundation is a fantastic organization looking out for the rights of citizens. Public Knowledge is another organization that those stakeholders, we, the American Library Association, all need to sit down at a table with and try to hammer out a lot of these issues. And so as we get into talking about the legal niceties of the statute as it exists versus what should or should not exist for public policy reasons, we have to take into account that if for public policy reasons, the statute needs to be amended, then let's sit down and address that. But let's not have the courts legislating from the bench in order to get to what some would think is the right result or the wrong result.

Now, is it difficult for the copyright holders to prove that there has been a violation of the rights of reproduction as opposed to the making-available theory? Yes, it may well be difficult. But be that as it may, it's often difficult in litigation for a plaintiff to prove that there has been any sort of violation of the law in the first place and then prove what the damages may be. Now, the recording industry chose to go after its consumers. In this instance, they would be "alleged consumers" to a certain extent. There's debate, of course. For those of you that have ever engaged in using P2P file sharing applications for the purpose of sampling a piece of music, you may say to yourself, okay, you know, I would not have bought this piece of music. I wouldn't have bought this album. I wouldn't have bought this song. I wanted to listen to it and hear it. And there are a lot of instances where people have downloaded a piece of music, said, "Hey, I really like this artist. I want to support this artist. I'm going to go out and I'm going to buy this song or I'm going to buy this CD or I'm going to license it from iTunes." There has been a lot of that going on. But be that as it may, the RIAA and its member companies have chosen to pursue a course of litigation against consumers that I think, to date, some 20,000 lawsuits have been brought. When you look at 20,000 lawsuits versus how many cases have actually come to trial, there're a miniscule number of cases. I think that generally speaking, litigators and courts like to say 90% of cases settle before they go to trial. In this instance, I think that it is close to 98—99+% of the cases settle. And in each instance of those settlements—although it's very rare for there to be any sort of public disclosure about that—settlements range probably from between $2,500 to $5,000 to $10,000 depending upon certain circumstances.

When you multiply 20,000 cases times those settlement amounts, well, I think that the recording industry is doing pretty well in terms of settling their cases. They would like for this making-available theory to exist not so that they can necessarily preserve an exclusive right that either does or doesn't exist—and that's debatable, an exclusive right of distribution that is impacted by P2P—but also so that they can continue with these lawsuits—even though they have said that they're going to cut down on or eliminate these lawsuits against users or consumers. They still want to have that hammer to hold over the heads of P2P users and say, "Look, you should settle with us because you're not going to win. We have seen that you have made available in your share folder these ten songs. There's no way you can possibly win because these cases have come down that say that making-available is a direct copyright infringement." It leads to more settlements, a little bit more pressure, of course, on P2P users.

Maybe, consequently, Congress will amend the copyright act to specify that distribution occurs when there is a making-available in a folder. Or maybe Congress will say, "Look, the penalties are just too high for statutory damages to apply in these sorts of instances."

Now let's talk for a minute about what happens—I touched upon this briefly—what happens when someone installs a P2P application on their desktop or their computer. Not every software application provider is the same—when I was at Morpheus, we tried really hard to fully disclose to our users exactly what the software did; what folders were created; what happens when they downloaded files using P2P; what folder it went into; how, if it went into a share folder, how they could and should—if they didn't want it to remain in a share folder—immediately remove it from that share folder and so forth. There are not always that many P2P application providers that we were as concerned, or are as concerned, about users as Morpheus was, or they don't really care, or they believe that there shouldn't be leaching on P2P file sharing networks—leaching being, I'm going to take, but I'm not going to give. And so there have been hearings before the Federal Trade Commission. There were hearings before the House Oversight and Government Reform Committee a couple of years ago where former-General Wesley Clark testified as to national security risks as a result of using P2P applications that basically said, "If you have a government user who's using their home computer and they have a P2P application on their home computer, it's possible that they have classified documents in their share folder and they may not even know that."

So what this goes to in part is intent. Whether there should be strict

liability for making-available or whether someone has accidentally or unwittingly or unknowingly caused files to be put into their share folder—which are all big policy implications. And if we go back to the one example that I talked about before which is, you're user Ten Million and One and you grab one file, should the rest of the ten million users who also have that file on their computer all be held equally liable for—did they actually distribute? Did they actually reproduce? Is this something that they should be held liable for and whether the statutory damages against them is $750 for one infringement, or $150,000 for one act of infringement for one song or file? These are tough issues, and I don't think that anyone in this room wants to see an innocent person found liable for copyright infringement under a making-available theory and hit with up to $150,000 for one particular file. So should there be—we have to look at the issue of not only as making-available an infringement in and of itself and should it be, but whether there should be any sort of intent or willfulness that is implied here.

Of course, intent and willfulness may be implied in terms of the damages stage because under the Copyright Act, the statutory damages are greater for willful infringement than for infringement that was not willful. But regardless, even if it was not willful infringement, the damages could be $750 at the very bottom end of the spectrum. And we have to look at the damages issues. I think that's an important issue. The *Thomas* Court is looking at damages issues. There may be a case—I forget the case—that's on a Petition for Writ of Certiorari on damages.

RUSSELL FRACKMAN: I don't know.

MATTHEW NECO: At some point, unless Congress acts, the Supreme Court's probably going to have to look at the issue of whether statutory damages in the P2P world are appropriate or whether those are punitive in nature and therefore, unconstitutional.

And so there are definitely a lot of issues here that we need to look at in terms of simply the making-available theories, as well as damages. Russ, can I borrow your vinyl for one second? Thank you. So let's say that I happen to have a great vinyl collection and my friends are getting back into vinyl and they want to borrow some of my vinyl to play because they just want to play records, and I lend this to them. And they go home and they have one of those new turntables that have an output in there that allows you to digitally record analog, from analog to digital. And I know that they've got this turntable, but I haven't asked them, "What are you going to do when you take this LP home with you?" I have now made available to them an LP that they could then copy, that they could then put on their share folder, and that could possibly become distributed.

Do we want to open the doors, even a little crack, to allow for there to be infringement or that I could be accused of infringement because I lent an LP to a friend? I'm done for the time being.

RUSSELL FRACKMAN: I've been sitting on my hands.

MATTHEW NECO: Because he wanted to slap me.

[LAUGHTER]

RUSSELL FRACKMAN: Here's what Thomas did. She didn't go out and take an LP and lend it to a friend. She had 1,700 copyrighted recordings on her share folder on a network called Kazaa—that many of you know was infamous for what their users did—with 2.5 million users logged on at the same time that the *Thomas* defendant was logged on. We all know what was going on there. And it wasn't a situation where there was one recording that was literally being shared. When you actually share something with somebody else, you don't have it. It was 1,700 recordings being made available and no doubt, no doubt, a significant number of them over time actually having been distributed.

And the issue of damages is a separate issue, although I will confess, in the *Thomas* case, the plaintiffs were probably too successful and I think that was a large reason why the judge decided to reexamine the jury issue. At $222,000 in damages—you could make an argument for it. It was $9,500 per infringement and I'm sure somebody could make an argument that the value of what she made available and what was actually ultimately used exceeded that. It wasn't $150,000 for each infringement. And the Copyright Act, as you know, makes accommodation for innocent infringers and the statutory damages for innocent infringers can be very low, I think about $200 per infringement.

But if you examine all of these 10,000, 20,000, or 30,000 cases that were filed by the RIAA, you're not going to find, I don't think, somebody who had one recording available. You're going to find more people than not who are like the *Thomas* defendant who had thousands and thousands of recordings available.

MATTHEW NECO: But it's noteworthy that I think it was only 22 recordings that she was found liable for infringing upon.

RUSSELL FRACKMAN: Well, that is another issue here, and the issue being that in order to fully prove what someone has on their share folder, you need discovery. You need to get access to their computer and you can't do that until you have a lawsuit. Certainly you can log on to the service and download, but there are a limited number of investigators, one of the issues that Professor Dougherty mentioned. But there was no doubt that ultimately Thomas had 1,700 of these recordings on her share folder.

Now, let me make one other point. I did not mean to imply by what I

said that the sole argument for a making-available right is a policy argument. I think—and I think we'll get into it—that there are significant legal arguments and legal precedents that support the making-available right. What I was trying to say was that having a making-available right is consistent with the policies of the Copyright Act, the policies to grant exclusive rights for limited times in order to encourage creators to create and ultimately to benefit the public by having those additional creations. And I think what I tried to lay out is that, without the making-available right, those policies are going to be severely impacted.

And in terms of the law—just as an introduction and then I'll defer to Matt—there is solid precedent, particularly in the Ninth Circuit, for a making-available right. Not unexpectedly, probably the first is the *Napster* case where the Ninth Circuit said, "We agree that plaintiffs have shown that Napster users infringed at least two of the copyright holder's exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights."[22]

That was followed more recently in one of the *Perfect 10* cases. The *Perfect 10 v. Amazon*[23] case, citing the *Hotaling* case that Professor Dougherty mentioned and it's in your materials, said, "*Hotaling* held that the owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works. Similarly, the distribution rights of the plaintiff copyright owners were infringed by Napster *users*, (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users."[24] But an arguably very similar right was found in the *Perfect 10* case. So I think it brings up another collateral point, which you may or may not have picked up in your copyright studies, but when you start to practice in this area the first thing you need to try to figure out when you're actually litigating is where you're going to file your lawsuit because the law is different in different jurisdictions, pointed out not only by the *Perfect 10* cases in this area, but also by the fact that I suspect if you sued in the Ninth Circuit, you'd have a much easier row to hoe than if you sued in the Eighth Circuit.[25]

PROFESSOR DOUGHERTY: Russ, how could uploading a file name

22. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

23. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

24. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007).

25. *See, Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

be an infringement of copyright in the file?

RUSSELL FRACKMAN: First of all, let's understand that we're talking about a different situation in *Napster* than we are here. Here, it's not just making-available a file name, but it's making-available a file. I think, and you will read, and Matt may very well say, "Well, the *Napster* Court said that, but they really didn't supply any precedent for it." Although we did argue to the District Court and to the Court of Appeals and cite the *Hotaling* case, but that was a different situation. I think the main thing here is that that was the Ninth Circuit shorthand for saying that they were not only uploading a file name, they were making-available that file. That's what uploading the file name to the Napster central server meant.

PROFESSOR DOUGHERTY: Some of the other more recent making-available cases have rejected the *Napster* precedent for that reason. They just say it reflects a misunderstanding of copyright law and some courts have bought into that argument.

MATTHEW NECO: Right, as well as the misunderstanding of the technology.

PROFESSOR DOUGHERTY: If you wouldn't mind, let's go back a little bit to the beginning again and talk about whether—assuming there is a transfer of a digital file, is that a distribution? It's certainly different from the brick-and-mortar world where I have a physical object and now I give it to Russ and now I don't have it. When I spoke with Andy Bridges, his initial statement, before we even got into the making-available issue, was "I don't think that even if there is a transfer of file, that that's a distribution."

RUSSELL FRACKMAN: I know Andrew Bridges. Andrew Bridges is a friend of mine.

[LAUGHTER]

But he also will tell you that fair use is not an affirmative defense. And I disagree with him there and I disagree with him here. And I think in that area, that's one place where the law seems to be at this point pretty unanimous that it does not have to be a tangible copy that is distributed. And I think the argument that is made by others, and probably by Bridges—and I won't purport to talk for Matt—is that the Section 106 distribution right talks about distributing "copies" or "phonorecords." And then they say, well, a digital file isn't a "copy" or a "phonorecord." The fact of the matter is that when the '76 Act was passed, it expressly envisioned the potential for changes in technology. And, of course, the Internet is the largest change in technology. The fact that you're transferring a digital file rather than a vinyl record seems ultimately not to have concerned the courts, and I would suggest shouldn't, both because of

the broad protection that the legislative history indicates was intended to be accorded and because of the practical effect of transferring a digital file.

MATTHEW NECO: So it's complex, undoubtedly, for a number of reasons. Not only is it complex because the law is complex and it's a hodgepodge in a lot of ways. And certainly when Congress amended the Copyright Act to include digital phonograph distribution, they could have included that DPDs within Section 106 and they chose not to. My viewpoint is I don't think that there's a distribution that occurs here. There may be a reproduction. There's no distribution because we don't live in the material world online, so you're not taking that vinyl and giving it to someone else and therefore, parting with your copy of it. But there may in fact be a reproduction in terms of taking a digital file and it gets copied.

Now, technically speaking, I don't know where it gets copied. If I have that file on my computer and Russ wants to download it, I don't know whether I'm making the copy for Russ or Russ is making the copy. Anybody out here that's technologically oriented that knows the answer to that?

RUSSELL FRACKMAN: There is also the possibility that both are making the copy.

MATTHEW NECO: I suppose that's possible. And it's also interesting to note that—although the record companies and the publishing companies have some shared interests, they also have very divergent interests in a lot of matters pertaining to commerce and copyright. But it's interesting to note that in certain circumstances, the content industry is trying to get it both ways because they want to say that if you download something from iTunes, for example, that you've licensed a song from iTunes. And I say licensed rather than buying a song because very often your rights are not the same rights that you may have with that vinyl because at some point in the future, you may not be able to play that licensed piece of music because of digital rights management.

A lot of the content industry is saying, well, there's also a public performance going on and we want to get paid royalties based upon public performances because it's being cached on your computer for a short period of time. And so, I hate to say, but it seems that the content industry is trying to put as many hands into your pockets as possible, as frequently as possible, and so I think that that's an issue.

Now getting back to the law itself as to whether making-available is a distribution. I think neither Russ or I are going to spend too much time on these issues because I think the briefs, including the amicus briefs lay it out pretty well and you can go and read those and see what they say. But Congress has been specific in the past when they want to talk about

something being made available or there being an offer. For example, in the Copyright Act under Section 901, in connection with the protection of semiconductor chips, the statute says "To 'distribute' means to sell, lease, bail or otherwise transfer, or offer to sell, lease, bail or otherwise transfer." So Congress knows how to be specific.

In the Patent Act, in terms of infringement, the core infringement provision includes: "Whoever without authority makes, uses, offers to sell or sells any patented infringement, a patented invention, infringes the patent"—offers to sell. Congress is perfectly well capable and has been perfectly well capable 50 times since 1976 to amend the Copyright Act to be specific as to making-available and there being a distribution. And my interpretation of 106(3) and other subsections of 106 of the Copyright Act lead me and others to conclude that making-available is not encompassed within the exclusive rights of distribution for digital content.

PROFESSOR DOUGHERTY: Wasn't that semiconductor legislation passed by a later Congress than the one that drafted the 1976 Act?

MATTHEW NECO: Sure, but there have been amendments—

PROFESSOR DOUGHERTY: So over a period of a decade or so later, arguably they were able to make clearer that they intended to cover a making-available right. But the argument on the other side would be that Congress did say that distribution includes making-available because they meant distribution to be a publication. Now that's one of the controversial issues in this particular set of disputes. And the people on the defense side say, well, look at the plain meaning of the statute. The statute talks about sale, transfer of ownership or certain types of transfers of possession, and that's what a distribution is. Folks on the other side say, no, Congress meant that all publications are distributions. And what they can point to is the legislative history. The statute isn't clear about that. It doesn't say to distribute means to publish, right? But there's certainly evidence that Congress at least confused the issue in the House Report, which is probably one of the main pieces of legislative history for the 1976 Act.

There are several instances where the Congress that did pass the 1976 Act basically didn't even refer to the distribution right when they're defining distribution; they referred to is as a publishing right. So they said "The exclusive rights encompassed by Sections 106 (1) through (3) can generally be characterized as rights of copying, recording, adaptation and publishing." Not distributing, publishing. Later on they say "Clause 3 of Section 106 establishes the exclusive right of publication." So arguably, they meant publication to be what distribution is.

On the other hand, there's other language in the House Report where they talk about specific sales of copies, so maybe they just were a little

confused. It illustrates the difficulty in using arguments about legislative intent. Sometimes what we have is more legislative confusion than legislative intent, perhaps, but there is an argument to be made that Congress meant the same thing by publication and distribution.

RUSSELL FRACKMAN: Professor Dougherty is a good advocate, and I know he's trying to be neutral here.

[LAUGHTER]

I agree with most of what he said, but let me add something to that which I think is maybe more directly applicable to this publication/distribution debate.

There are cases out there—I think *Harper & Row*[26] and maybe some others that do say the terms are equivalent—but if you go back—most of you probably have never seen this before—this is the 1909 Copyright Act.

[HOLDING UP A PHYSICAL PRINTOUT OF THE ACT]

PROFESSOR DOUGHERTY: Look how skinny it is.

RUSSELL FRACKMAN: Yes, unannotated, though. Exclusive rights to "print, reprint, publish, copy and vend"[27] the copyrighted work, okay? You can trace this through, I would submit logically – and I agree with Matt – these arguments are very dense and complex and you should read the commentaries on both sides.But there is a logical argument that the exclusive right to publish—which no longer exists separately in the 1976 Act—and the right to vend—which no longer exists in the 1976 Act—were combined into the right to distribute. The right of first publication and the right to vend—in other words, the right to sell. And then you go from there to the definition of publication in the 1976 Act, which includes—in substance, at least—a making-available right. It doesn't really make sense. I would submit that the 1976 Act which intended to, at the very least, broaden rights and broaden its applicability to new technology would do away with the right of first publication. And there are other arguments for that.

Let me go back to something else that both Professor Dougherty and Matt mentioned, which is the statutory interpretation issue. The fact that other aspects of the Copyright Act and other acts for the same purpose have the term "distribution" defined differently, I think, can be argued both ways. Matt made the very cogent argument from his perspective that when the Copyright Act wanted to say "offer" or "make available," it did. As Professor Dougherty said, these provisions were much later and you can't assume that Congress would have gone back and corrected everything.

---

26. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

27. 17 U.S.C. § 1(a) (1909).

There is also another later amendment to the Copyright Act, Section 1101, Unauthorized Fixation and Trafficking in Sound Recordings and Music Videos, the bootleg statute, which includes, among unauthorized acts, someone who "distributes or offers to distribute, sells, or offers to sell."[28] Ask yourself why there should be any difference between putting up a bootleg sound recording, a live, unauthorized recording, on a peer-to-peer network and putting up one that was manufactured by the record company. I don't see it. You may be dealing with different rights, but I don't see a logical distinction.

And while we're talking about statutes, there's one other thing that's argued. You'll see it argued in the cases and in the briefs. I don't know if I have it here. There's a very similar statute that deals with child pornography. It's a criminal statute in Section 18 of the U.S. Code. Here's one of the cases. It's called *United States v. Shaffer*[29]. It's very interesting. That section talks about "any person . . . who knowingly receives or distributes . . . any child pornography."[30] And in a criminal conviction—and there are several of these—one of the Courts of Appeals said about the defendant: "He may not have actively pushed pornography on Kazaa users"—same system, Kazaa—"but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items."[31] And that was distribution. Same word, criminal statute, and same system.

MATTHEW NECO: However—

RUSSELL FRACKMAN: I knew there would be a however. . .

[LAUGHTER]

MATTHEW NECO: There was a criminal statute and, as a matter of fact, in 2007, then-Attorney General Alberto Gonzales had pressed the U.S. Congress to enact an actual intellectual property bill with criminal penalties for copyright infringement, including attempts to commit piracy. That bill was not passed. And so, while there was a criminal bill involving—was it child pornography or child. . .?

RUSSELL FRACKMAN: Child pornography statute.

MATTHEW NECO: A statute involving child pornography. There's nothing involving other types of files that is criminal that includes the making-available or attempting to distribute copyrighted files. I'll also note that the 1909 Copyright Act was really an act that was more beneficial

28. 17 U.S.C. § 1101(a)(3) (2007).

29. *U.S. v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007).

30. 18 U.S.C. § 2252A (2007).

31. *U.S. v. Shaffer*, 472 F.3d 1219, 1223 (10th Cir. 2007).

for publishers than it was for authors. And so when the 1976 Act was enacted, there was a shift in ideology and policy to favor authors as opposed to publishers. And so that might account for the distinction between the 1909 Act, to a certain extent, and the 1976 Act. I'm speculating here, but an argument could be made as to why there's a bit of a difference between the two. Also when you look at Section 106—I'm just going to reiterate what was in one of the briefs or two of the amicus briefs—I think this is in the CCIA brief—it talks about how Section 106 includes—also Subparagraphs 4, 5 and 6—that basically argues that not all instances of making-available are the equivalent of distributions because the other sections talk about public displays and public performances where you can have a public performance or a public display and that's making-available to the public, but clearly that's not a distribution.

So if you can have certain subsections that talk about performances that don't equal distributions, then why is there not greater specificity in connection with distributions and why making-available always equals distributions? It doesn't always equal distributions, nor does it, I think, equal distributions when you have a file in your share folder. It comes down to, let the copyright holder prove that there was an actual distribution. And that's what I think that the law intends. I think that's what the law says. And I think that if there should be a change to that, then let that change come from the legislature rather than from the courts—who are clearly confused because if it was such a clear issue, we wouldn't have divergent opinions here. Every single court that has looked at this would say, "Oh, it's clear on its face that making-available equals distribution. That's an infringement, a direct infringement of an exclusive right."

RUSSELL FRACKMAN: I know you want to leave time for questions and there's an awful lot to say and maybe you'll invite us all back again to say some other stuff when more cases come down. But I just want to point out one other thing. That there is, maybe you could call it a middle-ground in some of these cases, where the courts arguably say, we're not going to say simply because you had a copyrighted work on your computer that was capable of being downloaded by somebody else, that's in and of itself a distribution. But it is circumstantial evidence combined with other circumstantial evidence—the nature of the work, how many works, the nature of the system, how long it's been up, the fact that investigators have been able to download it, the fact that the defendant has tried to corrupt or throw out his or her computer, terms of service that might permit the service to further distribute works that are made available by users. All of those things combined indicate, circumstantially I suppose, an actual distribution even though there may not be proof of an actual distribution.

And then of course, there is the other aspect that we can only touch upon that Professor Dougherty mentioned, which is the use of investigators. And certainly some courts will say that if an investigator or the copyright proprietor himself or herself downloaded something, that's evidence of a distribution.

PROFESSOR DOUGHERTY: Do you think that any of these cases might actually get to the point where they have to deal with that circumstantial evidence aspect rather than settling or defaulting out? Do you think there'll be a case. . .?

RUSSELL FRACKMAN: You guys probably know that the RIAA has announced that they're not bringing these lawsuits anymore. There still are a number that are floating around out there—and I frankly don't know what the policies are in terms of the RIAA's continued litigation of some of these cases. I know that in some of them, as Matt mentioned, there are some organizations—the EFF and others—who have a great interest in getting these issues decided and litigated. And I don't know the status of any of them other than the *Thomas* case, but I would think, given the large number of cases out there, that there's a distinct possibility one of them, at least, might get up to the Circuit level.

PROFESSOR DOUGHERTY: We are running pretty much out of time and we do need to leave some time for questions. So let's talk a little more about the future and what you just referred to also.

MATTHEW NECO: Before you do that, can I just interject? Yes, some of the cases have basically said that you can have circumstantial evidence, which is interesting. But one of the important things to note is that that makes it more difficult for the copyright holder when the copyright holder is pressing the lawsuit to win on summary judgment because there will be more factual issues here. So the copyright holder will have to develop its case better than simply making an allegation that the user made available and here are some screen shots that our agent downloaded. And there is debate about whether an authorized agent can infringe upon a copyright and so forth, as we've touched upon—which is both good and bad because it makes the case more expensive for the defendant to have to get past the summary judgment stage and actually to have a trial. But also, I think, if there are going to be trials on this, there are going to be some interesting issues that come up here that I touched upon. Did that person really know that he or she had files in his or her share folder and what they really meant, that they would be available for distribution?

RUSSELL FRACKMAN: Last word. . .

[LAUGHTER]

Famous last words. None of these cases I think have reached the stage of summary judgment in that respect, but it's not at all clear to me that since a court can draw reasonable inferences from uncontested facts on a summary judgment that you cannot get a summary judgment based on all or some of the factors that would be undisputed, presumably—or largely undisputed—that I've enumerated. But that remains to be seen.

PROFESSOR DOUGHERTY: There are a whole slew of really fascinating arguments and issues that have arisen in these cases that we're not having the time to go into the back-and-forth on. So I'd invite you to look at the cases and the briefs and the handout materials, among them being, for example, the argument about whether a person making files available is authorizing distribution, and if that authorizing is a violation of the law. I'm not taking a position one way or the other on that because our time has essentially run out.

What I would like to say, though, is that it's pretty clear that litigation is not a business model and that it's unlikely that the record companies intended to make up their lost revenue by all these lawsuits. It's more likely that they were trying to create a public impression that people could get in trouble for this, partly to deter people from doing it, and partly to buy some time so that legitimate digital models could be developed. And that apparently is developing as those statistics I mentioned in the beginning of the discussion I think illustrate.

MATTHEW NECO: I have to note that the only reason that iTunes exists—my thinking and the thinking of a lot of others—is because of peer-to-peer file sharing applications. But for the existence of P2P file sharing applications, there would probably not be an iTunes.

RUSSELL FRACKMAN: I think there's room to debate that.

[LAUGHTER]

PROFESSOR DOUGHERTY: Interesting statement. So what I want is to draw this discussion to a close and leave a few minutes for questions from the audience. There is this announcement about the deal made with the internet service providers to help police large file transfer. And this is occurring not just in the U.S., but also around the world. Last summer there were deals made in France, I believe, and some other foreign countries like this, and it seems like that's more likely to be a strategy that's used to try to limit unauthorized infringements. But is it possible that the digital distribution of music will become largely authorized, or will it become just a way to promote live performances by artists, no charge, and sales and merchandise and things like that? Where are we going from here?

MATTHEW NECO: I think it can and should be a combination of the

two with there being some sort of a compulsory or collective licensing scheme that—

PROFESSOR DOUGHERTY: Placed on whom?

MATTHEW NECO: Placed on the end user, the consumer, who perhaps will pay $5 extra to his or her ISP and then money will go into a pool and then based upon actuarial statistical accounting, would be distributed. I think that is certainly a viable option. And what we have to do is be fair not just to the performers who are alive, who can get up there and perform—and there's some debate as to whether [an older artist] is still alive when he gets out there and performs—I'm not saying that these rights should go on indefinitely in that copyright holders should have an annuity for as long as they currently do have, but you have to give some credence to the fact that not everyone's going to get up there and perform. And songwriters are not necessarily—except to the extent that they've got venue licenses to the venues—they're not necessarily being compensated quite the same way that performers are being compensated. So I don't think that it's fair to the copyright holders to rely simply upon merch and live performances, or other rights holders as well, but P2P certainly is a marketing and promotion mechanism for many other uses, including uses in synchronization uses. There have been plenty of songs placed in television shows and movies that were first played on or discovered on P2P. So there are other types of income streams.

RUSSELL FRACKMAN: My two cents: I'm not a business person and so I'm not qualified to answer that question, really, I'm just a litigator. And as I tell my clients, I'm the last resort, and I think my clients happily agree with that. I know that the record industry is searching, and has been searching, for all sorts of different models and hopefully will come up with one or more that work. I do think that there's one thing that has grown out of the litigation. I don't agree with Matt that there wouldn't have been an iTunes, but I think there might not have been, without the *Napster* and other litigation, the availability and the acceptability of many technologies that will now permit peer-to-peer or user-generated content sites to operate while at the same time filtering out or blocking copyrighted material. That didn't exist with Napster. In fact, one of the things Napster had to do was to develop a filtering system and, as you probably know, it did not do a complete job and, therefore, ended up being shut down.

But I think where we're going now is more in line with—as Professor Dougherty said—cooperation, which I think both sides—if I can call them sides—both sides appreciate is what needs to be done. And now I think—although I'm also not a technology person—in large part it can be done.

MATTHEW NECO: I'll debate that for a moment because I know that,

first of all—I'll touch upon looking at it from the ISP level in a second—but looking at it from the application level, to actually have effective filtering is extraordinarily difficult in many respects, not the least of which is that you're now taking an elegant decentralized tool for distribution and you're centralizing it. You're hobbling it. You're putting in central points of failure, which impacts the technology, and also it's not going to catch everything.

On the ISP level, they tried to pass legislation in France two weeks ago to require ISPs to have what's called a warning and step-up procedure. And on a voluntary basis, this has been successful for a couple of ISPs in Ireland, but it's not legislated. There's some talk that some of the ISPs in America may voluntarily engage in the sort of detection of—it's not even detection. What would happen here in America would be that the copyright holder would say to the ISP, "This particular IP address is infringing. [The holder would] send them a letter and tell them they can't do that anymore." If it happens a second, time you send them a stepped-up letter, tell them they can't do that anymore. If it happens a third time, cut off their ISP access making it impossible for them to get on the Internet. There's a lot of room for a lot of debate on this that we can't do in the minute that remains. But you have to ask, if you're an ISP subscriber and you've been accused of infringing upon copyrights, whether you want your day in court before your access to your ISP gets cut off, and whether having access to an ISP and having access to the Internet nowadays is basically becoming a fundamental right and need.

RUSSELL FRACKMAN: I know we have to stop so I'll just finish my . . .

MATTHEW NECO: I'll let Russ have the last word here.

RUSSELL FRACKMAN: I'm just going to quote Groucho Marx; whatever Matt said, I'm against it.

[LAUGHTER]

PROFESSOR DOUGHERTY: And I'll make two final comments because, in fact, I have the last word.

[LAUGHTER]

PROFESSOR DOUGHERTY: One is, I don't think we should let this end without mentioning the fact that there is a whole other level of complexity with regard to cross-border and international issues here. In fact, one of the things that gave rise to this [discussion] was a moot court problem involving actual evidence of a download, but in another country . . . and where that leads to all this. And I don't think we should let it go by without mentioning the conviction yesterday of Pirate—

MATTHEW NECO: The four owners of Pirate Bay.

PROFESSOR DOUGHERTY: Basically, four or five people given jail terms for facilitating downloads and I think a $3 million fine.

RUSSELL FRACKMAN: Not in this country.

PROFESSOR DOUGHERTY: In Sweden, yes, and they're not happy about it and of course it's going to be appealed.

I also want to put in a little plug for a legitimate system called Lala.com, the one I happen to use right now, where it permits me to listen to any song I want to—all the way through, not just 30 seconds—but listen to it once. If I like it, I have two choices: I can pay 10 cents and have it put onto a server and I can listen to it anywhere, anytime, for as long as Lala is around, I guess. Or, if I want to have a physical copy, I can pay 89 cents, I think it is, and I can download it. And it doesn't have digital rights management like Apple does, so I can basically burn a copy if I want, et cetera. That's kind of a cool system and I'm assuming they're paying some of that money back to the songwriters and to the record companies.

And there are of course many, many other examples of legitimate digital industry that are growing up. If the industry can survive—and I imagine we all think it will—there's hope for artists and songwriters and probably even record companies going forward. So let's spend a few minutes for questions. . .

[APPLAUSE]

GREG STRAUSBERG: All right, if there are any questions you have for our panel?

AUDIENCE: You had it on one of your slides, but it never really came up. Where does the Register of the Copyright stand on this? Do they have any authority to kind of fill in the gaps for the statute and if not, why not?

MATTHEW NECO: They have opinions, but their opinions have no weight of law.

RUSSELL FRACKMAN: Well, that's not quite accurate. There's a debate as to what weight they have, but you will find case law that says that the opinion of an administrative body that administers a particular statute is to be given weight. Those cases that you'll read that don't give it weight try to sidestep that, but the Register of Copyrights—I just happen to have it here—in 2002 wrote to Congress—to Congressman Berman: "[M]aking [a work] available for other users of a peer-to-peer network to download . . . constitutes an infringement of the exclusive distribution right."[32] And as I say, this does come up in the cases. Some say, yes, that's impressive. And

32. Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28th Dist. of Cal. (Sept. 25, 2002). *See Motown Record Co., LP v. DePietro*, 2007 WL 576284 (E.D. Penn.) (not reported).

in the *Thomas* case, for example, the Judge said, "Well, I don't have to listen to that."

MATTHEW NECO: And of course, there's some question as to the constitutionality of the Register of Copyrights right now, a whole other series of cases[33] involving the copyright royalty judges and appointments of lesser agency heads and whether it has to be confirmed and approved by the Senate and so forth. But that's a whole other three hours.

AUDIENCE: If there is a making-available right, where does it end? Can Google be held liable for someone who does a search term and it returns a file that they could download that is an encroaching file? Now, would Google be held liable because they have made available that file?

RUSSELL FRACKMAN: That's a good question. I'm not sure that there's an overall answer, but I can answer specifically the state of the law now. The hypothetical that you posed, I think is answered by the *Perfect 10 v. Amazon* case. And I read to you part of it, and as I said that the Court there found that even though *Napster* indicated there was a making-available right, it did not apply to Google linking to infringing works. What the Court said was, "[t]he deemed distribution rule does not apply to Google. Unlike the participants in the Napster system or the library in *Hotaling*, Google does not own a collection of Perfect 10 full-sized images and does not communicate these images to the computers of people using Google's search engine."[34] Now you can debate whether that's factually accurate, but as a matter of law, under the *Perfect 10* case, that would probably not be what the Ninth Circuit would call "deemed distribution."

PROFESSOR DOUGHERTY: There may be contributory liability issues under some circumstances.

RUSSELL FRACKMAN: Yes.

PROFESSOR DOUGHERTY: But there are also portions of the Digital Millennium Copyright Act that provide some safe harbors for information services.

AUDIENCE MEMBER: So under part of that same theory, if a peer-to-peer user had a decentralized server that no one had ownership of or that was owned offsite, and they provided access to an index of the files that

33. The issue of the constitutionality of the selection of the Copyright Royalty Board was raised but not considered by the U.S. Court of Appeals for the D.C. Circuit in *Sound Exchange, Inc. v. Librarian of Congress*, 571 F.3d 1220 (D.C. Cir. 2009), and *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 571 F.3d 69 (D.C. Cir. 2009). However, the issue is currently being directly challenged in *Live365, Inc. v. Copyright Royalty Board*, 2010 WL 621718 (D.D.C. 2010), where the court denied both the defendant's motion to dismiss and the plaintiff's motion for a preliminary injunction allowing the case to continue.

34. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007).

were on that server or on their own computer, could they escape the making-available liability?

[LAUGHTER]

MATTHEW NECO: Russ will say no. [LAUGHS]

RUSSELL FRACKMAN: I know the answer, I don't quite know why.

[LAUGHTER]

RUSSELL FRACKMAN: But if you gave me more time, I could probably give it to you. And one easy answer at the moment is, as Professor Dougherty said, with the *Perfect 10 v. Amazon* case, the possibility of contributory liability under these circumstances. And that case is still being litigated. I'm not involved in it any more. Sometimes the line between contributory and direct infringement, as you know, is narrowly drawn. But that would be my first answer. And my second answer would be, give me more time and I'll think of a reason.

PROFESSOR DOUGHERTY: And the international aspect of it adds a whole other unsettled difficult issue that, again, if we had another couple of days to talk about it, maybe we could. But I think that adds to your hypothetical: if the server was located in some country we don't have copyright relations with, for example, that's a whole other set of problems.

AUDIENCE: Just on a more general basis, I mean isn't this really just a big argument under semantics? If you can break everything down and take out the arguments about intent and somebody that didn't realize their files were being shared, and it happens that a good actor gets punished, isn't this really just a semantic debate over a bad actor and a good actor? And how do you just look at somebody like Thomas who knows what they're doing and just basically letting people take stuff or free? Is the debate that the law doesn't provide in actual words right now? So you've got two sides; one side looking for the right word on how to punish somebody and is frustrated, and another side is excepting liability by arguing that this is not the right word and so we should let Congress decide? What more is it than a semantic argument?

RUSSELL FRACKMAN: I think in many respects it is a semantic argument and [that is] one reason why I started with the policy issues as opposed to the direct legal arguments. And I think you'll find, when you litigate these cases and other cases, what you want to focus on, at least initially, is what seems right and what seems wrong. A perfect example of this is if you look at the Supreme Court opinion in *Grokster* where on the key issue that everybody thought was going to be litigated, which is substantial non-infringing use, they were all over the place and didn't base the decision on it. But at the end of the day, they said, "Well, you know, you called yourself Grok*ster* because you wanted to get the Nap*ster* users."

That was one reason. And that's just not right. And so here we have the inducement theory.

AUDIENCE: This is a question for Mr. Frackman. I'm just curious that in the early days, sort of when iTunes was just getting going, and all the record companies were very anti-that whole model, instead of figuring out how we can make money on that, did they analyze the problem by saying we're going to go litigate or sue infringers?

RUSSELL FRACKMAN: First of all, I can't speak directly to this because I don't know the answer to it. What I do know is, if you go back to the early days of Napster, one of Napster's big arguments was—and Matt paraphrased it, maybe, to some extent—we are the ones who are dragging you kicking and screaming into the 21st Century, record industry, and therefore you ought to thank us for taking your stuff rather than sue us. I know that in the years before then, the record industry had done a study—I believe it was called the Madison Report—of the potential uses of the Internet in connection with recordings. So they were looking into that. They were spending time thinking about it. One of the rejoinders in the *Napster* case by us was, well, you guys don't have to think about all the things that we have to think about: Paying recording artists and others. What rights do we have with respect to the recording artist? What do we do with our brick-and-mortar customers (who, for the most part, now no longer exist)? What royalties do we have to pay and to whom do we have to pay them? How do we market? How do we protect from copying? All of those issues. And at the time of Napster, I will tell you as I said before, I was, as a litigator, the last resort. But Napster was going forward. It was growing. These issues had not been resolved on a business basis, either with Napster or internally, and so that's why there was the litigation. I must assume that these kinds of issues are discussed all the time by the business people and hopefully end up with something that makes sense.

AUDIENCE: What is the threshold for copyright infringement based on making available being an offer to sell? Is there a concern of finding liable a lot of somewhat innocent people?

MATTHEW NECO: I would say there is a concern. I'd also say that—not to be too political about it or maybe I should say I'm not going to be apolitical about—it is a concern because a lot of—not a lot, but a few high-level Department of Justice appointees come out of the realm of representing RIAA members and so there's sort of a thinking there and the legislation did pass recently.

I'm not a prosecutor, but I would say most individual users don't have to be too concerned about it. They should be aware of it. I'm certainly not saying ignore the law, but it'll be the big, bad actors that the DOJ and

attorneys general go after, more or less, I think.

AUDIENCE: My question's for Mr. Neco. It's about your example about giving the vinyl to friends who copy it. Is there a material difference between that or the friend has the ability to but does not copy it, as opposed to a digital internet distribution for sharing work?

MATTHEW NECO: Well, I think you started off by saying something about my knowing that someone's going to copy the vinyl.

AUDIENCE: Or they have the ability to copy it, whereas, they could also just listen to it.

MATTHEW NECO: Right. Okay, so they have the ability to copy it. They can just listen to it. On P2P, if they're downloading it, then obviously I still have my copy or my original and they have a copy as well. And so that's what a lot of this entire debate is about, or the entire difficult situation is, that you have all of these perfect copies that exist out in the ether and on people's computers.

RUSSELL FRACKMAN: It's sometimes difficult to draw analogies between the real world and the Internet world, including, among other reasons, you have the First Sale Doctrine that would say that if I buy this and own it, I can lend it to you. Now, if I buy it and own it and lend it to you knowing you're going to copy it, does that put it in a different realm? Or to make it a little bit easier, in the old days we had lawsuits against companies that were called Make-A-Tape companies.[35] And you guys are too young to remember this, but you'd walk into a store that had cassettes or 8-track tapes and you would buy a tape from them, they would—

PROFESSOR DOUGHERTY: A blank tape.

RUSSELL FRACKMAN: No, no. Well, you would buy both a recorded tape and a blank tape, and they would walk you over to the machine that they had and show you how to make a recording on the blank tape, a copy of it, and then they would buy back the recorded tape from you and you would have the copy. Now, that didn't work, but what I'm trying to get at is, there are lots of nuances to these issues, both in the hard copy world and in the Internet world, and they are not necessarily congruent.

PROFESSOR DOUGHERTY: There's also some clearly permitted non-commercial copying under the Audio Home Recording Act, too, so. . .

RUSSELL FRACKMAN: Yes. Which does not apply to computers, though.

PROFESSOR DOUGHERTY: Exactly, it doesn't cover this internet stuff.

---

35. *See, e.g., Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F.Supp. 821 (D.C.N.Y. 1973).

RUSSELL FRACKMAN: That's why it's kind of old-shoe now.

AUDIENCE: [INAUDIBLE QUESTION REGARDING COPYRIGHT INFRINGEMENT INVESTIGATORS]

RUSSELL FRACKMAN:

I think it's a broad right in theory. Now, in practicality, and one of the reasons it hasn't really been used—although there were a few cases lurking out there—is that it hasn't been necessary. For example, you guys all know, if you studied this, that at least one or two of the major cases in this area are swap meet/flea market cases.[36] And historically, those investigators would go to a flea market; they'd buy two or three of these and, if possible, the seller would be sued on everything offered that was infringing. Now there you had the possibility that the seller has been making—reproducing copies, but you didn't know that for sure. The issue never really was litigated because it wasn't that important, I think, and it wasn't that dispositive. People sometimes just assumed that that was an infringement. Hypothetically—and they don't exist anymore, but in the days when I started, you could walk into a regular retail store and buy these infringing tapes. Presumably making those available—at least I would say—would be an infringement. There's another area, by the way, another current area where that does have some utility. Suppose you go on eBay and somebody's offering to sell you a counterfeit or pirate recording. I would argue the same policy issues. You can't wait until they sell it in order to be able to sue them for making it available. If they didn't make it, they haven't violated the reproduction right. And so that might be another area. It's flexible.

AUDIENCE: I'm in the film business, so I guess my question would be regarding making available in that context.

RUSSELL FRACKMAN: Well, for a period of time, the film people, the MPAA, had their own user program. I don't think it ever got as far—I know it never got as far as the RIAA program—and I don't know of any cases that were litigated. But as you surmise, I would suspect that their interests are similar and, indeed, I believe in the *Thomas* case, the MPAA filed an amicus brief in support of the record companies. So I think everybody there sees their interests as being, in this regard, pretty much identical.

PROFESSOR DOUGHERTY: And the same principles of law would apply if what's being offered is a movie or what's being offered is a copyrighted sewing pattern. I don't think there was a lot of peer-to-peer file sharing in dress patterns. So it doesn't really—

---

36. *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

RUSSELL FRACKMAN: How do you know?

[LAUGHTER]

PROFESSOR DOUGHERTY: I made some of my own clothes. And so the legal principles we're talking about, though, would certainly be applicable regardless of whether the copyrighted work being made available is a song, sound recording, film or TV show. And actually Karen Thorland over at Loeb & Loeb, who helped us out a lot in these materials, actually has dealt with that specifically in the film context so you might want to contact her.

AUDIENCE: So how did the definition of publication and the definition of distribution play out in your analysis?

RUSSELL FRACKMAN: We've kind of truncated the whole argument and the whole debate between the definition of "publication" and the definition of "distribution." And there are many aspects to it. In the 1976 Act and—Matt, I think, alluded to this as well—in the 1909 Act, publication had several different uses, probably the most famous one being the line of demarcation between common law copyright and federal copyright protection. But I think the argument would be that in that case and other cases that [we] have talked about it—the legislative history that Professor Dougherty mentioned—and the right to publish and vend being replaced by the right of distribution are all pieces of the argument. I don't think necessarily any one of them is dispositive and, indeed, in the *Thomas* case the judge talked about why he didn't agree with that.

PROFESSOR DOUGHERTY: One argument against an argument based on precedent, one can argue that the *Harper & Row* case is a precedent that suggests there is a making-available right, but an argument against a precedent argument like that is to distinguish the precedent. And so the counter argument has been, yeah, that dealt with the first publication issue. It really wasn't dealing with other types of publications. So it weakens the precedential argument based on *Harper & Row.*

RUSSELL FRACKMAN: And along those lines, when you read these cases, you'll see that the making-available cases almost unanimously fall on the side of the *Hotaling* case that Professor Dougherty mentioned. The no-making-available cases cite almost unanimously this *National Car Rental* case.[37] I won't go into it, but when you read the two, you'll see they have language that is useful to one side or the other. Neither of them is an Internet case and neither of them falls squarely on one side or the other, I would submit, in the context of the Internet. But they are used because that's what's out there.

37. *National Car Rental System, Inc. v. Computer Associates*, 510 U.S. 861 (1993).